1982

State of Utah v. Ronald Dale Easthope : Brief of Appellant

Utah Supreme Court

David L. Wilkinson; Curtis J. Drake; Attorneys for Respondent;
Lynn R. Brown; J. Mark Andrus; Attorneys for Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

OGDEN STANDARD EXAMINER and STATE INSURANCE FUND, Plaintiffs, vs. THE INDUSTRIAL COMMISSION OF UTAH and LESLIE SKELTON and T. R. CHENEY, co-conservators for the dependent children of CLIFFORD CHENEY, deceased, Defendants.	Case No. 18311

WRIT OF REVIEW FROM AN ORDER OF
THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS

Gordon J. Low
HILLYARD, LOW & ANDERSON
175 East First North
Logan, Utah 84321

Carl E. Malouf
MALOUF, MALOUF & JENKINS
150 East 200 North
Logan, Utah 84321

Attorney for Defendants

Robert D. Moore
Timothy C. Houpt
BLACK & MOORE
500 Ten West Broadway
Salt Lake City, Utah 84101
Attorney for Plaintiffs

George M. McMillan
VAN COTT, BAGLEY, CORNWALL & McCARTHY
P. O. Box 3400
Salt Lake City, Utah 84110-3400

IN THE SUPREME COURT

OF THE STATE OF UTAH

OGDEN STANDARD EXAMINER and STATE INSURANCE FUND, Plaintiffs, vs. THE INDUSTRIAL COMMISSION OF UTAH and LESLIE SKELTON and T. R. CHENEY, co-conservators for the dependent children of CLIFFORD CHENEY, deceased, Defendants.	Case No. 18311

WRIT OF REVIEW FROM AN ORDER OF
THE INDUSTRIAL COMMISSION OF UTAH

BRIEF OF DEFENDANTS

Gordon J. Low
HILLYARD, LOW & ANDERSON
175 East First North
Logan, Utah 84321

Carl E. Malouf
MALOUF, MALOUF & JENKINS
150 East 200 North
Logan, Utah 84321

Attorney for Defendants

Robert D. Moore
Timothy C. Houpt
BLACK & MOORE
500 Ten West Broadway
Salt Lake City, Utah 84101
Attorney for Plaintiffs

George M. McMillan
VAN COTT, BAGLEY, CORNWALL & McCARTHY
P. O. Box 3400
Salt Lake City, Utah 84110-3400

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

AUTHORITIES CITED

IN THE SUPREME COURT

OF THE STATE OF UTAH

OGDEN STANDARD EXAMINER and STATE INSURANCE FUND, Plaintiffs, vs. THE INDUSTRIAL COMMISSION OF UTAH and LESLIE SKELTON and T. R. CHENEY, co-conservators for the dependent children of CLIFFORD CHENEY, deceased, Defendants.	Case No. 18311

BRIEF OF DEFENDANTS

NATURE OF THE CASE

Defendants adopt Plaintiff's statement as to the nature of the case, disposition by the Industrial Commission, and their relief sought on appeal.

STATEMENT OF FACTS

The deceased was killed in an automobile collision on a Utah highway on March 22, 1980, while traveling toward his home in Ogden, Utah, after attending the 1980 Governor's Ball held at Salt Lake City, Utah. At the time of his death he was 38 years old, his wife, who died in the same accident, was 35 years old. They were the parents of two minor dependent children, ages 8 and 10, for whose benefit this application

was filed before the Industrial commission.

The deceased at the time in question, and for approximately nine months prior thereto, had been the managing editor of the Ogden Standard Examiner newspaper.

He and his wife had been invited to attend the Governor's Ball by Mrs. Wilda Jean Hatch, president of the Standard Corporation, which corporation owns the Ogden Standard Examiner (R. 238-239). The Cheneys had driven their own automobile to the Hatches' residence in Salt Lake City, and after some social cordialities went to the ball with Mr. George Hatch, Mrs. Wilda Jean Hatch, and Randall Hatch (their son, also an employee of the Ogden Standard Examiner) and his wife. After the ball the three couples returned to the Hatches' residence, spent another short period and then the deceased, with his wife, commenced their fatal journey toward Ogden.

The Governor's Ball is primarily a fund raising event (R. 157) and is principally attended by business, labor and community leaders, and is generally attended by those people in order to further business interests (R. 158, 159, 160, 164, 170, 172). It is an activity in which business leaders particularly attend to "see and be seen" (R. 159, 172). Attendance is seldom viewed as a social activity (R. 174).

Those for whom a table was arranged and tickets supplied were exclusively managers of the various businesses owned by the Hatches (R. 248). Clifford Cheney, as managing editor

of the Ogden Standard Examiner, had no particular political alignment or preferences (R. 178, 194), nor was Cheney particularly an outgoing or social type of individual (R. 177-178). He was nevertheless described as a dedicated business and newspaper man (R. 180, 185, 194). Just prior to the night in question he had been heavily engaged in preparation of an anticipated publication of a certain newspaper article which, because of its sensitive matter, had recently fallen under criticism of management on a higher level than himself (R. 189, 195, 210). The major stated purposes for attendance at the ball by the deceased was for the purpose of rubbing shoulders with the "big wigs" and because management wanted him to (R. 187). The very last conversation prior to his leaving for the ball was with two reporters for the Ogden Standard Examiner who were working with him on the above mentioned article and that he was going to the ball in hopes for a chance to encourage acceptance by the Hatches of the disputed article (R. 197, 199, 200, 201, 203, 204).

During the week prior to his death, the deceased had visiting with him and his wife in their home, Mrs. Cheney's sister and her husband, Pam and Steve Skelton from Eugene, Oregon (R. 205). Despite the fact that the visit was an annual affair and the couple had a close relationship, the deceased was unable to spend much time with the visitors because of the pressures of work and specifically the completion of the

article in question (R. 198, 200, 201, 202, 210). The night of the ball was also the last night of the Skeltons' visit, and the deceased told his wife that he would attend the ball whether she did or not (R. 212).

It appeared from the testimony that it was exceedingly important for him to attend in order to spend time with the Hatches, the owners of the newspaper (R. 217). The deceased stated prior to his death that he felt the ball offered an opportunity to discuss and clarify with the Hatches newspaper policy (R. 217, 228). Prior to attendance at the ball, he rented a tuxedo for the occasion, which rental cost he considered a business expense (R. 218). He expressed to the Skeltons on the night of his death that he needed to discuss the paper and policy with the Hatches and get an understanding of their philosophies and policies on the content and other positions on editorial contents of the paper and publications of the article in question (R. 149, 229).

The general manager of the Ogden Standard Examiner and the deceased's immediate supervisor was Mr. Jack Banks (R. 272, 283). It was he who had taken charge of the affairs of the family and funeral arrangements the morning after the deaths, and it was he, as he testified, who would be involved in insurance claims and the like concerning the paper and its employees (R. 235, 272, 283). At the home of the deceased the day after the accident, when told by the decedent's father that he, the decedent's father, felt the accident

arose out of a business trip, Banks replied that he did not see a problem with that and "that the paper's insurance should cover it" (R. 234).

The Hatches, who invited the Cheneys to the event, are in their 60's. They testified that in their mind the occasion was a social event wherein they invited the Cheneys and their son and his wife in order that they may get better acquainted.

The invitation extended to the Cheneys was made by Mrs. Hatch at the office of the Ogden Standard Examiner. Testimony of the Hatches stresses that at the ball and during the visits at the Hatch home, business was neither discussed nor conducted (R. 246, 261, 276).

ARGUMENT

I

THE INDUSTRIAL COMMISSION'S FINDINGS OF FACT FULLY SUPPORT ITS LEGAL CONCLUSION THAT CLIFFORD CHENEY'S DEATH AROSE OUT OF HIS EMPLOYMENT.

As early as 1936 in the case of Jones v. Industrial Commission, 90 Utah 121, 61 P.2d 10 (1936), as cited by the Plaintiffs, this Court held in reviewing an order of the Industrial Commission it will examine the findings of fact by the Commission in light of the issue of law raised by the claim in order to determine whether such an award is supported by the findings.

The Court is to review the evidence in the light most favorable to the Commission's findings (Entwistle Company

v. Wilkins, 626 P.2d 495 (Utah 1981), and cases cited therein) and support the Commission's findings unless clearly arbitrary or capricious (Kavalinakis v. Industrial Commission, 67 Utah 174, 246 P. 698 (1926)).

Utah Code Ann. § 35-1-45 (1953) provides that the dependents of an employee "who [is] killed by an accident arising out of or in the course of his employment" are entitled to workmen's compensation benefits. Whether Clifford P. Cheney died as a result of "an accident arising out of or in the course of his employment. . ." depends on the particular circumstance of the case, Kinne v. Industrial Commission, 609 P.2d 926 (1980). Although there existed no written job description, it may well be agreed that the customary place of decedent's employment was the newspaper office. A newsman, however, would be well expected to be found on job elsewhere and certainly a managing editor would be expected to carry on the affairs of his office wherever necessary and opportune. Certainly the essential thing is that there be some substantial relationship between the activity engaged in and the carrying on of the employer's business, Askren v. Industrial Commission, 15 Utah 2d 275, 391 P.2d 302 (1964).

As argued by the Plaintiff, in a case where an employee whose place and hours at work are fixed, it is usually not difficult to ascertain whether an accident arises out of or in the course of his employment. The more difficult questions are presented when there exists no written job description

and where the time and work are flexible, as in this case. An employee even away from the customary and regular place of employment and duties thereof may nevertheless be covered by workmen's compensation insurance. Those situations arise when an employee is upon the special mission of the employer and the generally accepted rule remains that:

> That an injury sustained by an employee, either on his employer's or his own time, arises out of his employment if the employee is injured while on a mission for his employer.

Wilson v. Industrial Commission, 116 Utah 46, 207 P.2d 1116 (1949). This Court has adopted the concept that what is and what is not a special mission for the employer may depend upon the characterization of the employee's duties and those obligations which naturally flow from its work. In the case of Hafers, Inc. v. Industrial Commission, 526 P.2d 1188 (1974), this Court stated:

> The scope of one's employment includes not only those things which are direct and primary duties of the assigned job; but also those things which are reasonably necessary and incidental thereof.

The Plaintiff in its brief cited extensively from Professor Arthur Larson in his treatise, Workmen's Compensation Law, hereinafter referred to as "Larson." Larson is recognized as the leading authority in this field and the Defendant takes no exception to the references cited therein by Plaintiff, except that as to their interpretation of paragraph 3 of Larson's statement in Volume 1A, § 22, page 5, Point 41.

The employer need not derive some substantial benefit directly from the activity but the intent must be that some benefit be derived. It is certainly feasible that in any employment situation an employee could be sent on an errand, the result of which would be futile, but the benefit nevertheless was intended and therefore the activity would be considered within the scope of the employment. Such a test has been adopted by the Utah Court in the case of Martinson v. W. M. Insurance Agency, 606 P.2d 256 (1980). Although the decision in that case held against the applicant on a combined business and social function, the facts can easily be distinguished from this case. The law, however, lies in favor of this applicant. This Court, after discussion of the applicable law (and with which this applicant has no quarrel) concluded that the main reason for the trip to Park City in that case was for pleasure and that the applicant did not go to Park City for the primary purpose of conducting business, nor was there anything to be done at Park City that could not be done over the telephone and without leaving his office in Salt Lake City, and essentially that the applicant went there only because he wanted to and not necessarily to further the interests of the employer. That case is substantially different from this one on the facts and it is certainly understandable why this Court held as it did.

In this case, however, Cheney's primary motivation in attending the ball was far from social. The argument on

pages 10 and 11 of the Plaintiff's brief relative to social activities, parties, games, etc. as discussed in Larson have very little, if any applicability in this case, nor has this Court expressly adopted Larson "test" of compensability of accidents which arise out of social events.

The Plaintiff further cites the cases of Prouse v. Industrial Commission, 610 P.2d 1362 (1980), and Lundberg v. Cream O Weber Dairy Farms, 24 Utah 2d 16, 465 P.2d 175 (1970), neither of which cases hold any relationship to the case at issue. In the first case the Court denied the same on the basis that workmen's compensation coverage only provides coverage for those activities in which an employee is reasonably required to engage in the performance of his duties and which directly and intangibly benefit his employer. In that case, of course, horseplay did not. In the latter case, the Court specifically found that the deceased was in travel to and from work and, of course, this Court, and many others, has held that such an activity does not in and of itself qualify. The specific exception to that rule, however, is where the employee is engaged in a special mission or activity. Cudahay Packing Company v. Industrial Commission, 60 Utah 161, 207 P.2d 148 (1922).

The Plaintiffs also cite the case of Wilson v. Industrial Commission, supra, in contending that the law therein applies to this case. We readily agree. The facts, of course, in that case are substantially different; nevertheless, the

principle of law is still applicable and accepted by the Defendant.

This is not a case raising issues of law. It is a case of facts. The law is well established that there is a special omission exception to the travel to and from work, and this Court is simply called upon to determine whether there is a substantial relationship between the activity engaged in, i.e., the special errand or mission and the carrying on the employer's business.

This case, however, turns on one additional and extremely important fact, and that is that the deceased was in a managerial position and as such made his own decisions as to what he should do and what he should not do in furtherance of the employer's business, and he had fully in mind the intention of furthering said employer's business in using the Governor's Ball for such an opportunity.

In this regard, it should be understood at the outset that the Defendants have no argument with the established law in the State of Utah, and their position is simply that the facts of this case fall well within the established law, and as determined by the Industrial Commission, is fully compensable.

In this analysis, it is instructive to review the function and purpose of the Governor's Ball, the factors relating to the deceased's attendance thereto, and the purpose for the same.

The tickets were purchased by the Hatches and held only by managers of the Hatches' businesses. The two persons invited to attend were the managing editor and the promotion director of the Ogden Standard Examiner. The difference in ages between the Hatches and the Cheneys was almost 30 years (Tr. 122.17-123.60), the invitation thereto was made on the job by an officer of the Ogden Standard Examiner.

Two entirely unattached and presumably entirely unbiased witnesses, Maggie Wilde, the Governor's former press secretary, and Kent Briggs, the executive assistant to the Governor, are probably as highly qualified persons as can be found to testify relative to the Governor's Ball and those who generally attend. Each testified that business people attend to further business interests, that the ball is generally a fund-raising event attended by business, labor and community leaders where they can see and be seen and who go there to have doors opened to them in the business world and for their business interests. The apparent major reasons that people have for attending the Governor's Ball are political and business. But it should be remembered that Cheney is described as having no political alignment and was essentially apolitical. It can be safely concluded that he did not attend for political reasons. The fact that the tickets were held and a table reserved only for managers of the Hatches' companies is even more significant, and is the plethora of testimony as to the deceased's uttered intentions

for attending the ball.

It is undisputed that the deceased intended on attending the Governor's Ball that night specifically for the purpose of rubbing elbows with the big wigs and because management wanted him to (Tr. 39:5-12). Even more importantly, the event was an opportunity for him to discuss with the owners of the paper management policies relating specifically to the article in question. Even his very last conversation with the two reporters who were working with him on the article was that he was going to the ball in hopes for a chance to encourage acceptance by the Hatches of his disputed article. So important did this seem that he denied himself, with or without his wife, the opportunity of further visiting with family friends in order to attend the ball.

It is difficult to construe that such a decision would turn only on social reasons. It was stated emphatically that it was extremely important for him to go and spend time with the Hatches, the owners of the paper. Cheney felt the ball offered the opportunity to discuss and clarify policy. Even the tuxedo rental was considered by him as a business expense. He was unequivocal the night before his death in stating that he needed to discuss the paper with the Hatches to gain an understanding of their philosophies and policies on content and other positions of editorial matters of the paper, and that the ball would present that opportunity. Even Jack Banks, the general manager of the Ogden Standard

Examiner, apparently considered the Cheneys' attendance at the ball to be business related. Such, of course, would not be the case had he considered it only to be a social event.

It is clear that in the mind of the employee that he as manager would attend the Governor's Ball in order to further the interests of his employer by discussing the publication of the article and gaining an understanding as to their editorial policies. An analysis of the facts of this case can lead to no other conclusion but that the deceased intended on accepting the invitation to the Governor's Ball by his employer for reasons directly related to the interests of that employer and to the benefit of the newspaper. For the Plaintiffs to argue that the same was only a social event and therefore not compensable ignores really all essential facts in question.

There can only be one conclusion drawn from the Commission's findings and the evidence presented, and that is that Clifford Cheney considered attendance at that event to be within the course of his employment, necessary for his employment, and an intrical part thereof, and that the employer's business would be conducted and furthered by attendance thereat. Plaintiffs seem to rely heavily on the point that no conversation occurred relative to business purposes. It should be noted, however, that whether any were engaged in is not the test. The test is rather whether the employee was there with the intention and capability of conducting business of the

employer. There can be no other conclusion drawn than that is the exact reason he was there and the only reason he attended.

II

THE COMMISSION'S CONCLUSION THAT THE DECEASED'S DEATH AROSE OUT OF HIS EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Plaintiff raises in its Point II of argument that the deceased attended the Governor's Ball at the request of the Hatches and that such a request was social in nature. Despite the fact the Hatches testified that in their mind this was no more than a social invitation and this is hardly the only inquiry which need be made in this case. The Plaintiff appears mesmerized over the apparent three prong test of Professor Larson in that this was a social event, though not sponsored by the Ogden Standard Examiner, that Cheney's attendance was not specifically required, and the tickets were not purchased or paid for by the employer, nor that any claim was made that it was an employee benefit to which Mr. Cheney was entitled. None of these factors are important in a question to be decided.

What is important are the reasons that Cheney attended. It must be noted from the outset that the event in question was not a social arrangement, as the Defendant would have the Court believe. The tickets were not purchased by social friends, but by the heads of the Hatches' several businesses. And although Mrs. Hatch did testify that she had no business

purpose in mind in inviting the deceased to the ball, it is apparent that other considerations were in the mind of the deceased when he accepted the invitation. The tone of interchange as argued by the Plaintiff between Cheney and Mrs. Hatch is not determinative as to the purpose for his attending. Nor the fact that he needed to check with his wife, as he told his wife that he would attend whether she did or not. With respect to supervisory personnel and any conduct on their part making it mandatory for Cheney to attend, it must be remembered that he in fact was supervisory personnel, that he determined when and where he should go for the benefit of the paper. Nor does the fact that Cheney had any public relations responsibilities make any difference in this case. It has been the applicant's position all along that he did not attend for public relations nor as a social event, but in order to discuss a pertinent article and publication thereof, together with editorial policy, with the Hatches. It is helpful, however, to note that the Hatches presented Mr. Cheney to dignataries such as Congressman Gunn McKay and Mayor Steve Dirks (R. 262, 280). The Hatches and Cheneys, because of the substantial difference in age, were not particularly social friends (R. 254, 269) nor was there any testimony that was the case, and no other viable explanation by the Hatches given for the invitation to be extended that night except that it was a result and in connection with and for business purposes.

It should also be remembered in reviewing Professor Larson's "test" that an invitation from a boss can certainly take the aura of a command to attend, coupled with other factors. The other factors in this case are the editorial policy and pressure for publication of a sensitive article.

It would appear that the Plaintiff's argument really falls on the basis that blue collar workers are compensated for injuries suffered on the job simply because their job description and location for work is generally easily defined, and that managerial employees are denied workmen's compensation benefits because their work and their activities may be expanded to more than certain hours at certain places. Though Clifford Cheney was not self-employed, he was nevertheless in a managerial position where he made decisions for the benefit of the newspaper and specifically respecting editorial policy and publication. In this case, his stated and unequivocal intent was to attend that ball for the very purpose of discussing that editorial policy and publication with his supervisor.

Does the Plaintiff concede that if in fact he were to take a special trip for his employer away from the Ogden Standard Examiner office in order to conduct that discussion, and if in fact the discussion did not take place once he arrived, and he was killed on the way home, that he would not be compensated? Certainly the fact that the discussion was to occur at a social event such as the Governor's Ball

does not deny compensation to the two children of the deceased.

It is argued by the Plaintiff that Jack Banks, the deceased's immediate supervisor, had direction and control over the activities of the deceased and that since he did not specifically tell the deceased that he should go to the ball, therefore it is not covered. On the contrary, it was Mr. Banks himself who admitted the day after the accident that in fact Mr. Cheney's activities were covered and that the paper's insurance should provide compensation. To argue that the Industrial Commission has misconstrued the law in this case is missing the point of this entire appeal. The appeal is one based on facts, whether the facts in this case fall within the principle of law enunciated by this Court.

Plaintiff further argues that such an affirmation of the Industrial Commission's award would have an onerous effect upon workmen's compensation law in this state. It should consider the onerous effect such a denial would have upon the children of the deceased. Their father was engaged in work attending the event for the purpose of discussing and furthering the interests of the employer and was killed, together with his wife, while engaged in such activity. Plaintiff's argument that if this case becomes law it would create a strikingly difficult standard of compensability is far from the mark. The standard has already been established that the activity must be within the scope of or arising out of his employment. The facts of this case show specifically that in fact it was. For the Plaintiff to argue that this

case falls within such imaginable cases as refreshment breaks of co-workers, golf matches and lunch excursions is not only grossly unfair, it ignores the facts and is in poor taste. Not only is the argument inapplicable and unfinished, but certainly there are cases and circumstances where those kinds of events would be activities in which injuries would be compensable. The only conclusion that can be drawn from this case is that when going back to the original definition of a compensable injury being one that arose out of or in the course of his employment, Mr. Cheney was certainly engaged in his employment and was attending that event specifically for the purpose of discussing the newspaper publication and editorial policy with his immediate supervisors, and there is no other evidence but that those are the reasons he attended.

The Plaintiff freely speculates that Clifford Cheney attended for social reasons only, when there is absolutely no evidence that he did. The Plaintiff produced absolutely no evidence to show that the deceased's intended attendance thereat was anything but for business and no evidence was produced to show that any motivation he had whatsoever was for social purposes.

III

THE INDUSTRIAL COMMISSION'S AWARD IS BASED ON COMPETENT AND ADMISSIBLE EVIDENCE.

The Plaintiff argues in Point III that the decision by

the Industrial Commission was based entirely upon hearsay evidence and therefore apparently incompetent evidence.

This Court has long held that hearsay evidence is admissible, material and competent, Columbia Steel v. Industrial Commission, 92 Utah 72, 66 P.2d 124 (1937); Ogden Iron Works v. Industrial Commission, 102 Utah 492, 132 P.2d 376 (1942), and it is certainly agreed that the Court has further held that a finding cannot be based solely on hearsay evidence but must be supported by a residum of legal evidence competent in a court of law. Sandy State Bank v. W. S. Brimhall, 636 P.2d 481 (Utah 1981). Though it is true that the administrative law judge received extensive evidence from two reporters who worked with Cheney and were with him just hours before his death and also that of the deceased's brother-in-law and sister-in-law, who were also with him the week prior to and just hours prior to his death, such evidence, although persuasive, substantial and competent, was not the only evidence upon which the Commission based its award. The argument made by the Plaintiff that statements as to the deceased's state of mind are inadmissible do not square with the specific provision of this Court allowing hearsay evidence nor does it follow Rule 63(12) Utah Rules of Evidence. State of mind is specifically an issue in this case.

The rule specifically allows hearsay evidence to the declarant's "intent, plan, motive, design. . . ." The intent

is exactly what we are here concerned with. The case of State v. Wauneka, 560 P.2d 1377 (Utah 1977), is inapplicable to the issues herein.

The second argument by Plaintiff that the evidence admitted was incompetent is that the opinion as evidenced by an apparent lack of understanding the relevance of the testimony of Briggs and Wilde, was apparently not the testimony of experts. It is difficult to conceive of two individuals who would be more expert in the fields in which they were called to testify than these two individuals. Rule 56 of the Utah Rules of Evidence specifically provides for testimony from these type of individuals. With respect to the qualifications thereof, the Court refers specifically to Transcript, pages 9 through 24. The Plaintiff's quotation of Mr. Brigg's testimony is not only incomplete but entirely unfair as it does not take into account his complete testimony as foundational testimony for his expertise and it completely ignores that of Mrs. Wilde.

The Plaintiff's argument that no theory was advanced by the Defendant as to the relevance of the testimony of Briggs and Wilde seems to miss the entire point, as the Plaintiff has done throughout this case. The point is, from the testimony received that this event was not a social event but was a business event and that very few people attend it for social purposes but mostly for business and political purposes. The Plaintiffs have argued that the Hatches

attended for social purposes only, which may be the case with them, but was certainly a very unusual situation and cannot be patently applied to the deceased. It is necessary in this case for the Court to review the entire transcript of this matter in order to become familiar with all the facts in question. The Plaintiff's quotations from the transcript here and there hardly informs the Court as to all the facts pertinent herein. This case has a bulwark of non-hearsay, not just a residum, upon which the award can be founded. Specifically, Cheney was employed by the Defendant several months prior to and was so employed on the day of his death; that his was a position of manager for which the employer had no written or detailed job description; that the Governor's Ball to which he was to attend and generally attended not so much for social reasons but for political and business purposes; that Cliff Cheney was essentially a non-socialite and both personally and professionally apolitical; that he had been at the time of the ball working strenuously to complete and gain approval for publication of a controversial article; that his employer had rejected as too sensitive the article for publication; that others at the paper had hoped that he would use the time at the ball with the Hatches to gain approval for publication; that it is for the above purpose that they (co-workers and reporters) thought he was attending the ball; that he and his wife had company staying at their home, yet chose to attend the Ball despite the fact

that it was their last night together; that Cliff Cheney appeared to be agitated and concerned about the publication of the article and the meeting with the Hatches; that he had rented a tuxedo for the ball, the cost of which appeared to be a concern to his wife, which concern was apparently laid to rest with the comment by the deceased about it being a business expense; that the Hatches were at least 30 years the Cheneys' senior and not social friends; that the tickets to the Ball were supplied to or from the heads of the Hatch business organization only; that the invitation was made at the business office; that upon discussing the problem after the accident, the Defendant's general manager, Banks, admitted that the matter was work connected and the business insurance would take care of it.

The above facts standing alone would be sufficient to sustain an order of the administrative law judge, but the findings become overwhelmingly conclusive when supported by other competent and admissible evidence. That Cheney thought he had been invited for business purposes; that he needed to go to discuss editorial policy with the owner of the paper and to achieve approval for publication of a controversial article; that he felt is so necessary to attend that he would go with or without his wife; that he would go even though it meant the last evening that they had with their in-laws; that he considered the rental of a tuxedo a business expense; that for two days prior to and up to the very last

discussion he had with his co-employees and reporters, that it was his and their concern that he attend the ball to sell the Hatches on the article; that he was going because the owners wanted him to go; he intended to use the opportunity for the Defendant newspaper business.

Against all the above stated facts, the Plaintiffs can site only two; that the Hatches intended the invitation to be a social event, and that during the course of the evening the article and newspaper business were not discussed.

The law of this jurisdiction is that whether an employee is within the scope of his employment depends upon all the facts of a particular case. The three prong rule referred to as Larson's Rule is not his rule at all, and a careful reading of the text thereof as cited in the Defendant's brief aptly demonstrates the fallacy and lack of depth of Plaintiff's position. That in fact the deceased did attend the ball with the intent of performing a service for his employer. There can be no other conclusion rendered by the facts of this case but that the deceased was attending that ball with one purpose in mind, and that was for the benefit of his employers, that he was within the scope of his employment, that the accident arose out of his employment and is compensable.

CONCLUSION

The presumption must lie in favor of the findings made by the Commission. This Court has reiterated the principle numerous times that:

> . . .in reviewing a record every legitimate inference which can arise from the evidence must be drawn in favor of the employee where the Commission has made findings and award in his favor.

Continental Casualty Co. v. Industrial Commission, 75 Utah 220, 284 P. 313 (1929). See also Entwistle Company v. Wilkins, supra, and cases cited therein.

Taken in total, factors giving rise to the attendance at the Governor's Ball, can lead this Court only to reasonably conclude from a preponderance of the evidence that the decedent, Clifford P. Cheney, considered it his duty to attend the evening's activities. That he did so with the intent in mind of furthering the employer's business interest and that his attendance clearly resulted in an accident arising out of and in the course of his employment. Therefore, the decision of the Industrial Commission should be affirmed.

Dated this 6th day of August, 1982.

HILLYARD, LOW & ANDERSON

GORDON J. LOW

Attorney for Defendants

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of August, 1982, two copies of the foregoing BRIEF were mailed, postpaid, to the following:

Robert D. Moore
Timothy C. Houpt
BLACK & MOORE
500 Ten West Broadway
Salt Lake City, Utah 84101

George M. McMillan
VAN COTT, BAGLEY, CORNWALL & McCARTHY
P. O. Box 3400
Salt Lake City, Utah 84110-3400

Ruth Bolton
Secretary